



18 June 2020

**Mrs Isabella Campbell**

C/- Alandale Lifecare Limited  
1199 River Road  
Flagstaff  
Hamilton

By e-mail: cc: Christina@extra.co.nz

The Board

**Alandale Lifecare Limited**

1199 River Road  
Flagstaff  
Hamilton

By e-mail: david@alandale.co.nz

Dear Isabella and family and the Alandale board and management;

**Recommendation of a way forward - Complaint**

Covenant Trustee Services Limited ("Covenant") acknowledges receipt of a formal complaint from Isabella Campbell ("Isabella") and family on 8 May 2020, which was escalated to Covenant after the complaint was not able to be satisfactorily resolved by Alandale Lifecare Limited ("Alandale" or "the Operator"). We acknowledge and thank the parties for their patience while we worked through the depth and breadth of the complaint and issues.

Our role under the Retirement Villages Code of Practice ("COP") formal complaints facility procedure is to independently review the complaint and recommend a way forward to both parties. To achieve this, we have reviewed the background to the complaint, relevant documents and other information provided and have completed discussions with Alandale, Isabella and family.

Covenant has also sought external legal advice to complement its internal review and considerations, which review has included the occupation right agreement ("ORA"), Retirement Village Act ("RVA"), Regulations, Unit Title Act ("UTA") and the COP.

The complaints have been considered and separate recommendations made for each.

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## Background

Alandale is the operator of Alandale Village, an established village located in Hamilton. Alandale Foundation Board (a registered charitable trust) is the sole shareholder of the Operator.

The village is a unit title village and was built in stages and therefore comprises a number of body corporates. The powers and duties of the body corporates are exercised by a manager appointed by the Alandale Foundation Board. The current manager is the Operator.

Residents of the village hold a freehold unit title issued under the UTA for their unit and enter into an ORA with the Operator, the terms of which include the resident's right to occupy the unit and use the common facilities. Upon sale of the unit, residents retain the sale price, including any capital gain but less a deferred management fee (which is a maximum of 25% of the sale price of the unit).

Isabella resides in the village's apartment block. We understand that the apartment block consists of 15 apartments, of which some are owned by residents and others by the Operator (some are rented to residents and others used for other purposes such as a gym and craft room). The apartment block operates under its own unit title and body corporate structure known as "the Alandale Estate".

- (a) The residents of the apartment block are being asked to meet:
  - (i) The cost of having the fire wardens on site (\$550 plus GST per week per resident). The complaint records that this cost is being split between the residents only, rather than by the total number of apartments of the apartment block (some of which are owned by the Operator); and
  - (ii) A proportion of the cost to repair the apartment block, the price of which has been quoted as \$919,336 plus GST ("Repair Cost").
- (b) The Operator has, in the alternative, offered the residents an option to sell their units to the Operator at a fair market price, less the DMF at a discounted rate and also with the purchase price to exclude any discount for remediation costs.
- (c) The Operator received formal complaints from Christina Campbell, on behalf of Isabella (Apartment 208) in relation to the relocation from, and conditions of return to, the apartment block. The complaint alleges breaches of rights 1-8 of the Code of Resident's Rights, among various other matters.
- (d) The Operator has been unable to resolve the complaint to the resident's satisfaction, and Covenant (as statutory supervisory of the village) has been



asked to work with the parties to provide an impartial perspective and recommend a way forward.

**Core issues arising from the complaint:**

There appear to be three core issues arising from the complaint, which are set out below:

- a) *Did the Operator have the legal right to compel residents to move out of the apartment block?*

In our view, the Operator does not have the legal right to compel residents to move out of the apartment block. If the Operator recommended that residents find alternative accommodation as a result of legitimate safety concerns, then we consider the Operator was acting prudently and in accordance with its obligations under the relevant occupation right agreements (ORAs) and retirement village legislation.

If, however, the residents were compelled to leave the Apartment Block against their will or without their consent, then we consider the Operator was unlikely to be acting in accordance with its legal rights under the ORA, retirement villages' legislation and Unit Titles Act 2010 (UTA).

- b) *Who is responsible for the Fire Warden Costs?*

Isabella's occupation right agreement dated 22 August 2017 contains a provision stating "*The Resident will not be liable for any loss or inconvenience suffered by the Resident from any defect or want of repair to the Residential Unit*".

As the fire warden costs directly relate to a defect or want of repair to the Residential Unit (which definition includes both the apartment itself as well as Isabella's share in the common property, we consider that Isabella could be entitled to rely on this provision in declining to meet her share of the fire warden cost.

- c) *Who is responsible to meet the Repair Costs?*

As stated above, Isabella's ORA provides that Isabella will not be liable for any loss or inconvenience suffered by her from any defect or want of repair to the residential unit.

Based on this, we consider that Isabella could rely on this provision in refusing to meet her share of the repair costs.



## **Associated Issues of Complaint**

There are also 12 associated issues arising from the complaint and each of these is dealt with below:

1. *Proposal regarding purchase of apartments by Alandale:*

- *That Alandale advised that the offer to purchase the apartment would be below market value due to it being non-compliant. Alandale had offered Isabella \$115,000 less DMF when the apartment had been originally purchased for \$130,000. Net amount would be \$82,250.*
- *That Isabella had been placed in an untenable position due to the jurisdiction failures by Alandale and that no recognition or compensation has been offered for this.*

*Recommendation of a way forward*

Covenant recommends that Alandale continue negotiations with Isabella and family over the option to buy back her apartment, along with other options that may be available such as alternative accommodation within the village or at another village.

If Alandale did suggest to the resident that any purchase would be below market value due to the non-compliance issue, then it is recommended that Alandale apologise for any misunderstanding that has occurred. It is understood that a revised buy-back offer has since been made by Alandale.

2. *Zoom meeting 24 April 2020:*

- *The items on the agenda for the zoom meeting between Alandale and the affected residents had not been adequately addressed and that no follow up by Alandale to the residents for outstanding questions. The complaint had six questions that needed to be answered by Alandale.*

*Recommendation of a way forward*

That Alandale communicate with the resident to answer any questions that remain unanswered or are still unclear.

3. *Reclassification of status of all residents, including Isabella, from "independent" to "disabled" or "nearly disabled":*

- *Alandale has allegedly changed the resident status from independent living residents to disabled, because of the resident's ages.*
- *Isabella's medical records held by Alandale have been used to classify her as disabled in her absence and without notification to her. Accusation made that this information was shared with a third party, unduly influencing the recommendation reports from FENZ/Onsite/Hamilton City Council and Alandale did not challenge these assessments.*



#### *Recommendation of a way forward*

It is recommended that Alandale confirm to Isabella that she is an independent living resident and was not considered to be disabled and to further apologise for any misunderstanding that may have occurred.

It is further recommended that Alandale respond to Isabella about the alleged use of medical records and sharing with third parties.

#### 4. *Conditions of return of apartment residents at COVID 19 Level 3*

- *That Alandale requires Isabella to pay an extra \$632.50 (including GST) per week towards the cost of the two permanent fire wardens. This is over and above the normal ORA weekly fee. The annual cost of the two fire wardens is \$263,000 per annum;*
- *That Alandale has not investigated alternative options to the proposed private agency cost.*
- *That the fire warden cost has been allocated to only the occupying residents, albeit Alandale itself owns the other vacant apartments.*
- *That Alandale did not exercise a reasonable duty of care that has led to the extra costs and that Isabella had trusted her voting rights to the operator.*
- *That the consultation over the urgent evacuation was not held as per COP resident's rights – clause 2.*

#### *Recommendation of a way forward*

These issues are related to the core complaints, which have also been discussed above under "core issues arising from the complaint".

Alandale has confirmed that with only two residents residing in the apartment block, FENZ has agreed that only one fire warden is required. However, this could change if more residents return. Alandale has also confirmed that other alternatives to the agency have been considered but have been ruled out because they were either not considered practical or offered no material savings.

It is recommended that Alandale communicate with the complainants about the alternatives that were considered and the reasons they were not considered acceptable.

Alandale has also confirmed that a building warrant of fitness for the apartment block was in place with the last certificate being issued in December 2019 for a period of 12 months. It is assumed that building consents had been obtained and complied with, where required. It is suggested that Alandale seek a response from the issuer of the building warrant of fitness (BWOFF) as to why the BWOFF was issued but yet a few months later the fire report identified material concerns.

Covenant is satisfied that the operator had fully consulted with the residents and families over the unexpected building issues prior to the evacuation and had made



suggestions or recommendations in writing over temporary relocating from the village and that the evacuation was prudent for the resident's safety and well-being.

5. *Lack of representation on the Alandale Residents Committee:*

- *That the apartment residents no longer have a representative checking on them each week and this was changed without consultation. Residents are now required to take any issue to the village manager or nurse. This has caused the residents to feel isolated.*
- *That the chairman of Alandale Residents Committee has refused to hear their concerns about the current situation.*

*Recommendation of a way forward*

It is recommended that Alandale resume the weekly checks and continue them if they are an ORA contracted service or undertake consultation with the resident if this service is to be withdrawn.

In terms of the issues with the Alandale Residents Committee, we do not have jurisdiction to deal with residents committee issues can only encourage the committee to engage with Isabella and her family through this recommendation.

6. *Evacuation of Residents prior to Covid-19 Level 4 lockdown:*

- *Alandale's decision to vacate Isabella for her wellbeing, with the reasons being that they might not be able to provide care to residents if they became sick or that fire wardens may be unable to provide services under lockdown should they become sick.*
- *When Isabella was exited she went from a lower risk, lower density situation to being in the broader community and subject to higher risks of Covid-19. Isabella relocated to family, whereas other residents went to rest home facilities.*

*Recommendation of a way forward*

These issues have been addressed in 4 above.

7. *Cost of expected remedial work in relation to fire safety:*

- *Dispute the incomplete estimate from NZ Fire and Compliance Limited for \$919,366 ex GST for the remediation works.*
- *That Alandale was responsible for past fire hazard and building works in past years and that it is their cost to rectify and not the residents.*
- *Expectations are that the sinking fund is used towards remediation.*

*Recommendation of a way forward*

It is noted that Alandale does not operate a sinking fund but runs a budget for village operational costs, repairs and maintenance, which is funded by weekly fees from the village.



As described above, Isabella's ORA contains a provision stating "The Resident will not be liable for any loss or inconvenience suffered by the Resident from any defect or want of repair to the Residential Unit". Isabella could seek to rely on this provision in refusing to meet her share of the Repair Cost."

8. *FENZ and OnFire reports:*

- *That there are key differences in the reports from FENZ and the OnFire reports.*
- *FENZ recommended only completing works to the building ceiling of the apartments, where wires and fixtures have intruded walls and ceilings, whereas On Fire report in some instances appear extreme and extensive.*

*Recommendation of a way forward*

Our recommendation is that Alandale puts this question to the specialist providers of the fire reports and once a response is provided that this is shared with the complainants.

9. *Closure of Alandale by HCC:*

- *Disputes comments from Alandale that the Hamilton City Council could force Alandale to immediately repair the apartments and shut it down.*

*Recommendation of a way forward*

It is recommended that Alandale clarify this alleged comment to the complainants.

10. *Concerns about Alandale motives:*

- *That Alandale is intentionally seeking to force the apartment residents out in order to repurpose the building for another use; or*
- *To simplify the implications of upcoming legal challenges to how trusts are run (applicable from 30 January 2021).*

*Recommendation of a way forward*

We understand from communications with Alandale that they do not intend to repurpose the building for any other use at this time.

It is recommended that Alandale respond in writing to the residents on both of these allegations.

11. *Communication with the Alandale Board:*

- *The inability to contact the Alandale board chairperson or other member directly with concerns or questions (due to dissatisfaction with management responses) or attend board meetings*

*Recommendation of a way forward*

It is recommended that Alandale advise the complainant of the established policy and the roles and responsibilities of the Alandale governance and management and whether a board member will now meet with the resident/s or family.



12. *Code of Residents Rights:*

- *That the Code of Residents rights of items through 1 to 8 have been breached by Alandale.*

*Suggested recommendation of a way forward*

No specifics have been provided on how these rights were allegedly breached. In our view, the overall consultation and communications to the residents over the building issues along with the suggestions and recommendations for the temporary relocation was satisfactory.

We do not see any other material breaches of the Code of Residents Rights and have no recommendation to make regarding these alleged breaches.

We acknowledge that the circumstances for Isabella and family, other apartment residents, families and Alandale management/staff were and are difficult and distressing and heightened due to the country's health issues around Covid-19 and Government lockdowns.

We understand that the residents were invited to return to their units when the Government lockdown level reduced, albeit that the issues with the building remain to be resolved.

**Recommendation of a way forward – Summary**

While we have reviewed and responded to individual issues and complaints, this does not resolve the broader issues relating to the building remediation and or the need to continue with fire wardens, albeit we are of the view that Isabella is not liable to pay for the fire warden costs and or building remediation.

Other factors will still apply that will impact both parties, such as the inability to sell the unit until fire compliance is attained after any building remediation and the further inconvenience during any building works. This requires a specific solution for the parties.

The Code of Practice formal complaints process includes the option of mediation and we suggest that the parties move to this option if negotiations over a long term solution cannot be reached.

We wish both parties all the best and do hope that these recommendations lead to a mutually acceptable agreement.

Yours sincerely

**Malcolm T Gray**  
**Manager**